



**Kamau v Republic (Miscellaneous Application E425 of 2021)
[2022] KEHC 11338 (KLR) (Crim) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E425 OF 2021
LN MUTENDE, J
JULY 28, 2022**

BETWEEN

SAMUEL NJATHA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Samuel Njatha Kamau, applicant, was charged and convicted for the offence of attempted rape and subsequently sentenced to serve seven (7) years imprisonment. Through an application filed herein on November 19, 2021, he seeks revision and in particular consideration of the period he spent in remand custody pursuant to section 333 of the *Criminal Procedure Code* (CPC).
2. The application is brought on the grounds that the appellant was a first offender. That clemency be considered and the court do consider the delayed punishment.
3. The applicant swore an affidavit in support of the application where he deposed that the court did not consider the time he spent in remand.
4. The respondent through Ms Chege, learned counsel opposed the application on grounds that the trial court noted that the applicant absconded trial and that he was not remorseful. That the victim was mentally challenged and the seven (7) years sentence imposed was lenient as the appellant would serve ten (10) years imprisonment, that the 3 years subtracted by the court was also evidence that the court factored the time he spent in custody although the court did not expressly state so.



5. Section 333 of the *Criminal Procedure Code* provides that:

“(2) Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

6. That provision of the law applies in mandatory terms and it is the accused person’s entitlement. The court is required to state that it considered the period spent in remand and it must further deduct that period from the sentence meted out. This was stated in the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the Court of Appeal delivered itself that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on June 19, 2012.”

7. In the case of *Bukenya v Uganda* (Criminal Appeal No 17 of 2010) [2012] UGSC 3 the Court of Appeal stated that:

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this court in which we have emphasized the need to apply clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the court would give. But it must be considered and that consideration must be noted in the judgement”

8. In this case the applicant was arraigned on June 6, 2016, he was released on cash bail on March 27, 2017. He had been in remand for nine (9) months before he was released on bail.

His bail terms were later cancelled on April 18, 2019 after he absconded trial, the cash bail was forfeited.



9. The judgement was read on August 9, 2019 after he spent four (4) more months in remand. The total period to be deducted from the sentence was thirteen (13) months.
11. The minimum sentence for the offence of attempted rape as set out in section 4 of the *Sexual Offences Act* is five (5) years imprisonment and the maximum sentence is life imprisonment.
12. The victim was a person who had mental incapacity, the record confirms that the actions affected her as per the victim impact report filed. The witnesses also testified that it was not the first time the act was being committed. And, the court noted that the appellant was not remorseful.
13. In meting out the sentence the court stated that:

“Mitigation considered plus fact that he may be a first offender. Nature of the charge also taken into consideration plus the fact that are in Muruatetu case, the mandatory aspect of the sentence related to this section under which he was charged has been removed. Therefore he can be given any discretionary sentence including a sentence below ten (10) years.

However, given the fact that he had absconded thus causing his case to delay is the fact that he does not even seem remorseful or seem to realise that what he did was wrong. I feel that he may not be able to benefit from noncustodial sentence for first of all I doubt that he will not abscond.

As a result, I find that he will benefit more from a custodial sentence as he is sentenced to serve seven (7) years imprisonment. Right to appeal within 14 days.”
14. It is apparent that the trial court did not take into account time spent in custody. Therefore, I set aside the sentence imposed which I substitute with a sentence of 5 years, eleven (11) months imprisonment, after deducting the thirteen (13) months spent in custody.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY, 2022.

LN MUTENDE

JUDGE

In the presence of:

Applicant

Mr Kibathi for DPP

Court Assistant – Mutai

